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IN THE SUPREME COURT
OF THE
UNITED STATES

October Term, 1992

No. 92-532

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STATE OF ARIZONA, Petitioner,

vs.

JOSEPH BARTLETT, JR., Respondent.

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

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# BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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## STATEMENT OF THE CASE

In January, 1987, Joseph Bartlett, Jr. (Joe), then 23 years of age, was living in a mobile home court near the local high school in Sierra Vista, Arizona. He and his wife Nancy had separated some months before and Joe was living in the trailer, either alone or with his mother and at times with his wife and three children. The family had moved to Sierra Vista from Clovis, California, after Joe's step-father committed suicide in 1985. Although Joe was unemployed, he had worked at various jobs in Sierra Vista and had worked as a security guard in California. Joe had no felony convictions.

In the latter part of 1986, Joe met Mary, age 14, Susan, age 14, and another girl, age 15 (the fictitious names used by the Arizona Supreme Court are utilized herein). These girls lived in or regularly visited Joe's trailer park. Mary and Susan, who were best friends, were not virgins when they met Joe. In fact, they were both quite experienced sexually. Joe began to date Mary who was living with Joe's mother in late 1986. Mary had voluntary sexual intercourse with Joe in December, 1986, when she was 14 years and 10 months of age. Susan also had voluntary sexual intercourse with Joe in December, 1986 when she was 14 years and 6 months of age.

On January 10, 1987, a Sierra Vista Police Officer went to Susan's home after it was reported that Susan's mother had discharged a rifle. Susan's mother told the officer that the rifle discharged as she was loading it with the intent to shoot Joe who was her neighbor. Susan's mother also reported to the police that Joe had forcibly sexually assaulted Susan.

When Joe later learned from neighbors that the police were asking about him, he voluntarily went to the police station. When the police asked about Susan, Joe explained that Susan had invited herself into his home one evening and began "teasing" him. He further explained that Susan began to massage his penis through his pants and then moved her hands inside his pants. At first Joe resisted, telling Susan to "knock it off" and go home. Susan did go home; however, she returned later that night. Susan let herself into Joe's home, sat on Joe's lap and kissed him. Joe went into his bedroom and Susan followed. The two undressed, had sex and afterward Susan kissed Joe goodnight. Joe admitted that he knew Susan was under 15 years of age at the time.

The police officer also indicated that Susan told him Joe had sex with her friend Mary. Joe readily admitted that Mary had been his girlfriend; that they dated for several months, going to the movies, dinner and the like. Sometime during their courtship, Mary told Joe that her mother advised her to use some form of birth control if she was going to have sexual relations. Joe admitted that the two thereafter had consensual sexual intercourse. Joe also admitted that he knew Mary was under 15 years of age at the time.

Joe returned home after the interview. A short time later, on January 23, 1987, the Cochise County Grand Jury indicted Joe for committing sexual conduct: with a 15 year old girl (a class 6 felony); with Mary, age 14 (a class 2 felony); and with Susan, age 14 (a class 2 felony). The State alleged that the crimes were in violation of A.R.S. Section 13-1405 (Appendix A), which is the substantive criminal law statute. The State also alleged the

provisions of A.R.S. Section 13-604.01 (Appendix B), which provides for enhanced punishment for certain crimes against children, including sexual conduct with a minor under 15 years of age. A.R.S. Section 13-604.01 did not apply to the charge involving the 15 year old. For that charge, the punishment is controlled by A.R.S. Section 13-701 (Appendix C), which is the general punishment statute.

Under the indictment, Joe's potential sentence for the charge involving the 15 year old could have been probation or incarceration for between 9 months and 1.87 years. At the same time, the potential sentence for the charges involving the 14 year olds was a minimum of 15 years and a maximum of 25 years, without possibility of release on each count.

During the pretrial proceedings, the State offered Joe a plea agreement covering all three charges which stipulated that he serve 5 years in the Arizona Department of Corrections. Joe rejected the plea agreement on June 19, 1987. Joe's court appointed attorney was allowed to withdraw from the case because of the rejection of the plea and substitute counsel was appointed.

On July 2, 1987, the State moved to invoke the enhanced sentencing provisions of A.R.S. Section 13-604(H) (Appendix D). Under the combination of statutes invoked, the sentences must be served consecutively, the the latter sentence being further enhanced by the "prior" conviction. Therefore, convictions for having sex with Mary and Susan would require a minimum term of 40 years, a presumptive term of 50 years and a maximum term of 60 years, all to be served without possibility of release.

Joe was tried in absentia on August 11, 1987. The jury convicted him with committing sexual conduct with Susan and Mary. He was acquitted of the charge of having sexual conduct with the 15 year old.

At sentencing on January 4, 1989, the trial court was required to sentence Joe to a minimum mandatory sentence of 40 years imprisonment without possibility of relase. Had Mary been 2 month older and Susan 6 months older, Joe would have been eligible for probation and the maximum possible sentence would have been 22 and 1/2 months with early release possible.

The trial judge, Richard A. Winkler, reluctantly applied the mandatory minimum sentence of 40 years and commented as follows:

> My function, as I view it, is not to second guess the legislature in regard to sentencing, but to follow the law. I took an oath to do that. The law is very severe. The law is more severe than -- or the punishment is severe. The punishment is more severe than in many other types of cases that are very serious offenses. But it is not my function to second guess what the wisdom of the sentence is.
>
> If in fact the sentence is too severe, I think that's for the Appellate Court to review. So I really have nothing else to say in regard to the sentencing. I'm going to impose the mitigated term, because I think that is plenty severe in this case.

Joe appealed to the Arizona Court of Appeals raising his Eighth Amendment argument. That court rejected the argument and affirmed his sentence.

The Arizona Supreme Court found Joe's sentence to be disproportionate. The 40 year sentence was vacated and the case remanded to the trial court for resentencing. The Arizona Supreme Court refused to stay its mandate pending review in this Court and the case went back to the trial court.

At resentencing on August 27, 1990, the trial court could impose minimum sentences of 5.25 years on the prior count and 7 years on the second count. Both sentences could be served concurrently with parole become possible after 2/3 of the sentences were served. The maximum sentence authorized was 35 years.

This time the trial court was presented with certain facts that were unknown at the time of the first sentencing. The State stipulated to the admission of documentary evidence showing that Mary and the 15 year old included in the original indictment against Joe had charged another man with a similar offense approximately 1 month after Joe was convicted. Mary had explained to her friends, in graphic detail, her sexual adventures with the other man which were initiated by her voluntary offer of oral sex. Although a criminal complaint had been filed against the other man, those charges were dropped and he was released from jail.

Joe and his attorney, David P. Flannigan also presented the trial court with a brief synopsis of Joe's situation:

> Mr. Flannigan: ... treated as a child molester ... he's on the absolutely lowest rung of the prison society. He has personally suffered immensely. He's been beaten, sexually raped, abused, victimized, threatened. Those are his day to day experience(s). He has suffered, in fact, a mental breakdown, has had to see a psychiatrist. Compromised himself in order to survive this kind of situation. It's an awful, awful world that he has been introduced into.
>
> If it could be said according to the evidence that he at all sinned against these girls, he's certainly been sinned against far more than that, and he has suffered immensely. If the purpose of punishment is to make him suffer, his suffering at this point far exceeds any harm to the victims.
>
> Mr. Bartlett: ... I agree with what Mr. Flannigan says,

> because it has been hard in prison, really hard. I want this Court to know that I have no resentment towards anyone. I have found my peace with God and with myself.
>
> My only wish is to finally go home, to be with my family, get a good, honest job and be a productive member of society and be the best father I can to my kids. I ask that this Court have mercy on me.

Thereupon, the trial court sentenced Joe to the mandatory minimum terms of 5.25 and 7 years in prison, to run concurrently, with credit for time served. The trial court observed as follows:

> The Court finds that the mitigating factor here that would require the mitigated term for sentencing would be that the Defendant had no prior record, and I just, quite frankly, feel that the mitigated term is sufficient punishment for the facts of this case.

On June 28, 1991, this Court vacated the Arizona Supreme Court's judgment and remanded the matter for further consideration in light of Harmelin v. Michigan, 501 U.S. ___ (1991). Upon remand, the court below conducted the proportionality analysis contained in Harmelin and once again found the original 40 year sentence to be disproportionate. The court below reinstated the 5.25 and 7 year sentences imposed by the trial court on resentencing.

The State of Arizona then failed to move the Arizona Supreme Court to stay its mandate in a timely manner. Thereafter, the State requested the Arizona court to recall and stay its mandate pending the filing of the present Petition. The court below denied that motion. (Appendix E). Respondent continues to serve his sentence. He is scheduled to be released from the Arizona State Prison in the early part of 1993.

## SUMMARY OF THE ARGUMENT

The real issue dividing the Arizona Supreme Court below is whether Justice Kennedy meant what he said in his concurring opinion in Harmelin v. Michigan, ___ U.S. ___, 111 S.Ct. 2680 (1991). The entire court below looked to Justice Kennedy's concurring opinion in defining the proper test to be used in determining whether a non-capital sentence was disproportionately severe. However, the majority of the court below, by Chief Justice Feldman, applied the approach articulated by Justice Kennedy. The dissent, by Justice Corcoran, used what was perceived as the test applied by Justice Kennedy. For the dissent, Harmelin announced a new rational basis test supplanting prior caselaw of this Court.

In Harmelin, Justice Kennedy explained the proper use of the proportionality test set forth in Solem v. Helm, 463 U.S. 277 (1983). There was no need to apply the "Solem three prong test" to the facts of Harmelin. The severity of the drug offense there, in itself, was sufficient to warrant a life sentence. There was no need for further analysis.

Harmelin did not overrule or "eviserate" the Solem analysis. Justice Kennedy's application of the proportionality test was not dissimiliar to the analysis used by this and other courts both before and after Harmelin. Further, the "holding" of Harmelin that the sentence there passed constitutional muster is directly applicable to

other drug cases which comprise the majority of cases raising the issue of proportionality.

Finally, the issue of "individualized sentencing" in non-capital cases, which did garner a majority of the Harmelin Court, is simply not at issue in the present case. Respondent no where challenges the proposition that a state legislature can constitutionally enact mandatory sentences in non-capital cases. Respondent is currently serving a mandatory sentence without complaint. Petitioner's attempt to insert that issue into this case presents little more than a red herring.

In the end, the Arizona Supreme Court correctly analyzed the facts of the present case in light of Harmelin. After doing so, that court correctly found Respondent's sentence disproportionately severe. Nothing the court did below is incorrect or inconsistent with any precedent of this Court. The present case is simply not one that warrants review by this Court. Therefore, the Petition for Writ of Certiorari should be denied.

## ARGUMENT

THE ARIZONA SUPREME COURT PROPERLY FOUND THAT A FORTY YEAR SENTENCE OF IMPRISONMENT, WITHOUT POSSIBILITY OF RELEASE ON ANY TERMS, IS GROSSLY DISPROPORTIONATE TO THE THE CRIME OF ENGAGING IN NONVIOLENT, NONINCESTUOUS, HETEROSEXUAL AND CONSENSUAL SEXUAL RELATIONS WITH TWO WILLING POST-PUBESCENT TEENAGERS.

A. The effect of Harmelin in the case below.

A unanimious Arizona Supreme Court previously found Joesph Bartlett, Jr.'s forty year sentence unconstitutionally disproportionate. State v. Bartlett, 164 Ariz. 229, 792 P.2d 692 (1991). Thereafter, this Court granted Arizona's Petition for Writ of Certiorari, vacated that judgment and remanded for further

consideration in light of Harmelin v. Michigan, ___ U.S. ___, 111 S.Ct. 2680 (1991). Arizona v. Bartlett, ___ U.S. ___, 111 S.Ct. 2880 (1991) (Bartlett I).

Upon remand, the Arizona Supreme Court first correctly found that Solem v. Helm survived Harmelin. Neither a majority nor a plurality in Harmelin was willing to overrule Solem or any other of this Court's prior proportionality decisions.

On the other hand, the Arizona Supreme Court did perceive a change in the application of the proportionality analysis set forth in Solem. Instead of the strict adherence to Solem's three-prong test advocated by the Harmelin dissent, the Arizona court applied Justice Kennedy's "harmonized" proportionality analysis. Under that harmonized analysis, the court first undertakes a threshold application of the first prong of the Solem test in determining gross disproportionality. Harmelin at ___, 111 S.Ct. at 2707. If that threshold test indicates gross disproportionality, then the other two Solem prongs are viewed in order to validate or invalidate that initial inference. Id. After faithfully applying Justice Kenndey's harmonized analysis, the Arizona Supreme Court once again found that Respondent's forty year sentence was unconstitutionally disproportionate. State v. Bartlett, ___ Ariz. ___, 830 P.2d 823 (1992) (Bartlett II).

The author of Bartlett I, Justice Corcoran, dissented in Bartlett II after remand from this Court. In Bartlett II, Justice Corcoran also looked to Justice Kennedy's opinion in Harmelin for guidance. However, instead of applying the test articulated by Justice Kennedy

in Harmelin, Justice Corcoran instead applied a test which he felt was conducted by Justice Kennedy.

In Justice Corcoran's opinion, Harmelin signalled a distinct departure from this Court's prior proportionality caselaw. Instead of the test set forth by Justice Kennedy, the dissent below applied a rational basis test in analyzing Respondent's sentence. As stated by Justice Corcoran, in conducting a proportionality review:

> I believe that we must look not at the facts or particular circumstances of the crime, but we must decide whether the legislature could, with reason, conclude that the threat posed to the individual and to society by defendant's offenses is momentous enough to warrant the deterrence and retribution of the sentences imposed. See Harmelin, ___ U.S. ___, 111 S.Ct. at 2706. If such a rational basis exists, then the sentences imposed are not grossly disproportionate to the severity of defendant's crime. Id.

Bartlett II at ___, 830 P.2d at 835.

The position of the dissent below would mean that Solem v. Helm is either overruled or "eviserated." Harmelin did neither.

In Bartlett I this Court instructed the Arizona Supreme Court to reconsider its previous decision in light of Harmelin. The Arizona Supreme Court faithfully followed that instruction and correctly found that Respondent's forty year sentence was constitutionally disproportionate under the harmonized Harmelin analysis. A brief analysis of Harmelin confirms that result.

B. An analysis of Harmelin.

1. Harmelin's proportionality holding.

The issue of individualized sentencing was the only one that garnered a majority of the Court. That issue is discussed below. However, while a majority of the Court could not agree on the other

issues prsented, in the end, Mr. Harmelin's life sentence was upheld. In this situation, the rule of decision is provided by Marks v. United States, 430 U.S. 188 (1977). As explained in Marks:

> When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds ... .

Id at 193.

In this light, the proportionality holding in Harmelin was that life imprisonment without possibility of release was not unconstitutionally disproportionate to a first-time offense of possession of 672 grams of cocaine. This holding is directly applicable to similar drug cases. For example, in United States v. Van Winrow, 951 F.2d 1069 (9th Cir. 1991), the court looked to this holding in Harmelin in rejecting a proportionality attack in a similar drug case. No extended analysis was necessary because of the similarity of offenses.

In fact, most of the cases in which a proportionality argument is raised involve sentences for drug offenses. The holding in Harmelin and other cases such as Hutto v. Davis, 454 U.S. 370 (1982) are outcome determinative in those similar drug cases without any type of extensive analysis. See e.g., United States v. Abreu, 962 F.2d 1425 (10th Cir. 1992); United States v. Salmon, 944 F.2d 1106 (3d Cir. 1991), cert. denied, 112 S.Ct. 1213 (1992); State v. Isom, 408 S.E.2d 701 (Ga.1991). Thus, the majority of the cases raising the issue of proportionality will be effectively resolved on the basis of Harmelin and similar cases.

2. Justice Kennedy's harmonized proportionality test.

Any analysis of Justice Kennedy's approach must begin, as he did, with a focus on the principle of stare decisis. Above all else, Justice Kennedy attempted to harmonize this Court's proportionality decisions. He avowedly did not overrule or "eviserate" Solem. Instead, he harmonized the Solem analysis with other proportionality decisions.

In elucidating the "narrow proportionality principle" contained in the Eighth Amendment, Justice Kennedy reasoned that Solem is "best understood as holding that comparative analysis within and between jurisdictions is not always relevant to proportionality review." Harmelin at ___, 111 S.Ct. at 2707. According to Justice Kennedy, a court should initially apply the first Solem factor - comparing the gravity of the offense and the harshness of the penalty - in making a threshold determination of gross disproportionality. Id. If an inference of gross disproportionality arises from that threshold determination then the second and third prongs of the Solem test are to be utilized to validate or invalidate that initial inference. Id.

An essential part of the threshold test continues to include a weighing of the gravity of the offense. In assessing this element, "(c)omparisons can be made in light of the harm caused or threatened to the victim or society, and the culpability of the offender." Solem at 293. (emphasis added). Justice Kennedy no where criticized the first Solem factor or its analysis. It should continue to be used in making the threshold determination of gross disproportionality.

The dissent below makes much of the fact that Justice Kennedy did

not view the individual culpability of Mr. Harmelin in his analysis. From this, the dissent finds that the Solem analysis has, in effect, been replaced with a rational basis test. In other words, the dissent supposes that Justice Kennedy accomplished, sub silento, that which he expressly refused to do - the overruling or eviseration of Solem. This is simply not the case.

The analysis conducted by Justice Kennedy in Harmelin is wholly consistent with Solem. The Solem Court itself was willing to say that "no sentence of imprisonment would be disproportionate" for some crimes such as the crime of felony murder. Solem at 290, n. 15. With this observation one would not expect the Solem Court to undertake an extensive analysis in finding any prison term for felony murder constitutional. Indeed, the Solem court itself noted that "a reviewing court rarely will be required to engage in extended analysis to determine that a sentence is not constitutionally disproportionate. Id at 290, n. 16.

Consistent with this direction, many courts applied an "abbreviated" Solem analysis before Harmelin. For example, in United States v. Whyte, 892 F.2d 1170, 1176, n. 16 (3d Cir. 1989), the court's analysis "focused primarily on the first Solem factor" in upholding the 35 year sentence there involved. Similarly, in United States v. Mendes, 912 F.2d 434, 441 (10th Cir. 1990), the court found "that the severity of Mendes' sentence under (21 U.S.C.) section 841(b) is not disproportionate to his offense under Solem, and a full Solem proportionality analysis is unneccesary on these facts." (upholding a 10 year sentence for possession with intent to distribute

cocaine and heroin). See also Moreno v. Estelle, 717 F.2d 171, 180 (5th Cir. 1983) (no Solem analysis necessary because "Rummel still provides the rule in cases with fact situations not clearly distinguishable from that in Rummel itself).

The post-Harmelin case of People v. Gaskins, 825 P.2d 30 (Colo. 1992), provides another interesting example. It is true that the court there indicated that without more definitive guidance it would adhere to its prior understanding of Solem. Id at 34, n. 10. However, Colorado's abbreviated Solem test, which was based on pre-Harmelin caselaw, is strikingly similar to the test advanced by Justice Kennedy.

Justice Kennedy's analysis in Harmelin is consistent with this line of cases. In reaching his conclusion, he found that the "severity of (Harmelin's) crime brings his sentence within the constitutional boundaries established by our prior decisions." Harmelin at ___, 111 S.Ct. at 2706. Harmelin's sentence was first compared to the 40 year sentence for possession with intent to distribute nine ounces of marijuana in Hutto v. Davis, 454 U.S. 370 (1982). Justice Kennedy then observed that it was rational to conclude that Harmelin's possession of that large an amount of cocaine was "as serious and violent as the crime of felony murder." Harmelin at ___, 111 S.Ct. at 2706. Therefore, "(i)n light of the gravity of (Harmelin's) offense, a comparison of his crime with his sentence does not give rise to an inference of gross disproportionality ... ." Id at 2707.

This does not mean that the Eighth Amendment is reduced to

measurement by a rational basis test applied in the abstract. Because of the nature of the offense there involved, there was no need to make an extensive analysis of Harmelin's culpability. It was the severity of the crime, itself, and a comparison with prior caselaw that determined the result. In this respect, reference to prior similar caselaw is a shorthand comparative analysis and this type of analysis is consistent with Solem based on the facts involved.

The facts of the present case call for a different analysis. If Solem is to have any meaning it requires that the culpability of Respondent be assessed in determining the constitutionality of his sentence. Certainly, it would not be rational to conclude that engaging in consensual sex with post-pubescent teenagers is "as serious and violent as the crime of felony murder." In the context of the present case, the culpability of the offender is a necessary element in the application of any gross disproportionality analysis.

Of course, this is not to say that the offender's culpability must be assessed in every case. It is one element that can be assessed. If a court is confronted with a proportionality attack in a case of felony murder, the type of crime itself will conclude the result without an assessment of personal culpability. In addition, the same can be said, at least after Harmelin, in similar drug cases.

3. Individualized sentencing.

A majority of the Harmelin Court clearly held that the Eighth Amendment does not require individualized sentencing in non-captial cases. Respondent has no quarrel with this holding. Respondent never raised this issue in the court below and that issue has no bearing on

the issue of the proportionality of his sentence. Those issues are clearly distinct. In fact, Respondent is currently serving a mandatory sentence in this case without complaint.

The concept of individualized sentencing is unique to captial punishment cases. In those cases, individualized sentencing means that the sentencer may not refuse to consider or be precluded from considering any relevant mitigating evidence. Hitchcock v. Dugger, 481 U.S. 393 (1987). Simply put, a mandatory death penalty constitutes cruel and unusual punishment. In each capital case there must be "an individualized determination that that punishment is 'appropriate' - whether or not the sentence is 'grossly disproportionate.'" Harmelin at ___, 111 S.Ct. at 2701.

In a non-capital case, a court is not required to consider any mitigating circumstances in the normal case. However, that does not mean a court is precluded from considering aggravating and mitigating circumstances in determining whether a sentence, mandatory or not, is grossly disproportionate.

Without the ability to view the aggravating and mitigating circumstances of an individual case, any meaninful proportionality review would be impossible. As stated by the court below:

> Surely, if this court has a responsibility to review the constitutionality of sentences under the eighth amendment, that duty requires us to apply the standards of the federal constitution to the facts of what occurred, no matter what label the legislature has attached to the criminalizing statute. Legislatures must of necessity paint with a broad brush, leaving it to the courts to measure constitutionality by applying law to facts -- the true judicial function.

Bartlett II at ___, 830 P.2d at 829.

If a court is precluded from viewing the individual circumstances

of a case in assessing proportionality, then any proportionality review would of necessity be little more than a second-guessing of the legislature. The courts would be painting with the same broad brush that the legislature must. Neither would be able to view any individual case. In essence, because of the judicial defference to legislative line-drawing, there would be no proportionality review by any court. In essence, the Eighth Amendment would have no effect on the legislature in a non-capital case. Harmelin certainly does not stand for that result.

CONCLUSION

Upon remand in Bartlett I, the Arizona Supreme Court carefully reviewed the facts of this case in light of Harmelin. After doing so, the court found that Bartlett's "original sentence constituted cruel and unusual punishment under the limited proportionality analysis and principle articulated in Justice Kennedy's concurring opinion in Harmelin." Bartlett II at ___, 830 P.2d at 832. The dissent below would not disagree with this statement. However, the dissent was willing to read more into the concurring opinion of Harmelin than was there in order to find that Solem was effectively overruled.

The difference of opinion spliting the Arizona court can also be seen, to varying degrees, in other courts addressing the proportionality issue. However, the lively discussion concerning the effect of Harmelin has not lead to divergent results. It is indeed only the rare non-capital case in which a sentence is found to be disproportionate - regardless of the analysis. In the time between Solem and Harmelin, Respondent is aware of four cases in which

sentences were reversed on the basis of a proportionality review. See, Harmelin at ___, 111 S.Ct. at 2713, n. 2 (White, J., dissenting). After Harmelin, Respondent is not aware of any case, except the present one, in which a sentence has been reversed on the basis of a proportionality review under the Federal Constitution. Cf. People v. Bullock, 485 N.W.2d 866 (Mich. 1992) (striking down the statutory provision involved in Harmelin under the Michigan Constitution).

Neither have the courts been inundated with cases challenging sentences that are disproportionate. In most cases in which the issue is addressed, the proportionality issue is quickly disposed of as one of many issues raised by a criminal defendant.

Harmelin did not signal a marked change in the law. As discussed above, many courts applied a similar narrow proportionality analysis prior to Harmelin. After Harmelin, the various courts below are fleshing out the parameters of the narrow proportionality principle elucidated by Justice Kennedy. The present case is but one of those cases.

In a real sense, it cannot be said that the decision of the Arizona Supreme Court below conflicts with the decision of another state court of last resort or of a United States Court of Appeals. The decision below certainly does not conflict with the applicable decisions of this Court. The Arizona Supreme Court faithfully applied the harmonized proportionality analysis set forth by Justice Kennedy in Harmelin which, by its own terms, considers the various applicable decisions of this Court. As such, the present case is simply not a

proper one for this Court to grant Arizona's Petition for Writ of Certiorari and that Petition should be denied.

RESPECTFULLY SUBMITTED,

HICKS & CONLOGUE, P.C.

By: J. Conlogue
James L. Conlogue
Attorney for Respondent

## § 13–1405. Sexual conduct with a minor; classifications

A. A person commits sexual conduct with a minor by intentionally or knowingly engaging in sexual intercourse or oral sexual contact with any person who is under eighteen years of age.

B. Sexual conduct with a minor under fifteen years of age is a class 2 felony and is punishable pursuant to § 13–604.01. Sexual conduct with a minor fifteen years of age or over is a class 6 felony.

Added by Laws 1977, Ch. 142, § 63, eff. Oct. 1, 1978. Amended by Laws 1983, Ch. 202, § 8; Laws 1985, Ch. 364, § 18, eff. May 16, 1985.

### Historical Note

**Source:**

Pen.Code 1901, §§ 230, 233.
Pen.Code 1913, §§ 231, 234.
Rev.Code 1928, § 4596.
Code 1939, § 43–4901.
A.R.S. former §§ 13–611, 13–614.
Laws 1962, Ch. 52, §§ 1, 2.
Laws 1967, Ch. 62, § 9.
Laws 1976, Ch. 111, § 5.

The 1983 amendment deleted at the end of subsec. A "and who is not his or her spouse"; and rewrote subsec. B, which had read:

"Sexual conduct with a minor under fifteen years of age is a class 2 felony. Sexual conduct with a minor fifteen years of age or over is a class 6 felony."

The 1985 amendment rewrote subsec. B which read:

"Sexual conduct with a minor under fifteen years of age is a class 2 felony, and the person convicted is not eligible for suspension or commutation of sentence, probation, pardon, parole, work furlough or release from confinement on any other basis except as specifically authorized by § 31–233, subsection A or B until the sentence imposed by the court has been served. Sexual conduct with a minor fifteen years of age or over is a class 6 felony."

Former § 13–1405 was renumbered as § 13–3885.

**1983 Reviser's Note:**

In the section heading "molestation of a minor" was deleted pursuant to authority of § 41–1304.02.

**§ 13–604.01. Dangerous crimes against children; sentences; definitions**

**A.** Except as otherwise provided in this section, a person who is at least eighteen years of age or who has been tried as an adult and who stands convicted of a dangerous crime against children in the first degree involving second degree murder, sexual assault, taking a child for the purpose of prostitution, child prostitution or sexual conduct with a minor or involving or using minors in drug offenses shall be sentenced to a presumptive term of imprisonment for twenty years. If the convicted person has been previously convicted of one predicate felony the person shall be sentenced to a presumptive term of imprisonment for thirty years.

**B.** Except as otherwise provided in this section, a person who is at least eighteen years of age or who has been tried as an adult and who stands convicted of a dangerous crime against children in the first degree involving aggravated assault, molestation of a child, commercial sexual exploitation of a minor, sexual exploitation of a minor, child abuse or kidnapping shall be sentenced to a presumptive term of imprisonment for seventeen years. If the convicted person has been previously convicted of one predicate felony the person shall be sentenced to a presumptive term of imprisonment for twenty-eight years.

**C.** Except as otherwise provided in this section, a person who is at least eighteen years of age or who has been tried as an adult and who stands convicted of a dangerous crime against children in the first degree involving sexual abuse shall be sentenced to a presumptive term of imprisonment for

ten years. If the convicted person has been previously convicted of one predicate felony the person shall be sentenced to a presumptive term of imprisonment for fifteen years.

**D.** The presumptive sentences prescribed in subsections A, B and C of this section may be increased or decreased by up to five years pursuant to the provisions of § 13–702, subsections C, D and E.

**E.** A person sentenced for a dangerous crime against children in the first degree pursuant to this section is not eligible for suspension or commutation of sentence, probation, pardon, parole, work furlough or release from confinement on any other basis except as specifically authorized by § 31–233, subsection A or B until the sentence imposed by the court has been served.

**F.** A person who stands convicted of any dangerous crime against children in the first degree having been previously convicted of two or more predicate felonies shall be sentenced to life imprisonment and is not eligible for suspension or commutation of sentence, probation, pardon, parole, work furlough or release from confinement on any other basis except as specifically authorized by § 31–233, subsection A or B until the person has served not fewer than thirty-five years.

**G.** Notwithstanding chapter 10 of this title,[1] a person who is at least eighteen years of age or who has been tried as an adult and who stands convicted of a dangerous crime against children in the second degree is guilty of a class 3 felony and shall be sentenced to a presumptive term of imprisonment for ten years. The presumptive term may be increased or decreased by up to five years pursuant to § 13–702, subsections C, D and E. If the person is sentenced to a term of imprisonment the person is not eligible for release from confinement on any basis until the person has served not less than one-half the sentence imposed by the court.

**H.** Section 13–604, subsections H and I apply to the determination of prior convictions.

**I.** In addition to the term of imprisonment imposed pursuant to this section and notwithstanding any other law, the court shall order that a person convicted of any dangerous crime against children in the first degree be supervised on parole after release from confinement on such conditions as the court or the board of pardons and paroles deems appropriate for the rest of the person's life. If the person is convicted of any dangerous crime against children in the second degree the court, in addition to any term of imprisonment imposed or in lieu of the term if probation is otherwise authorized, may order that the person convicted be supervised on probation or on parole after release from confinement on such conditions as the court or board of pardons and paroles deems appropriate for any term up to the rest of the person's life.

**J.** The sentence imposed on a person by the court for a dangerous crime against children in the first or second degree shall be consecutive to any other sentence imposed on the person at any time.

**K.** In this section:

1. "Dangerous crime against children" means any of the following committed against a minor under fifteen years of age:

(a) Second degree murder.

(b) Aggravated assault resulting in serious physical injury or committed by the use of a deadly weapon or dangerous instrument.

(c) Sexual assault.

(d) Molestation of a child.

(e) Sexual conduct with a minor.

(f) Commercial sexual exploitation of a minor.

(g) Sexual exploitation of a minor.

(h) Child abuse as defined in § 13-3623, subsection B, paragraph 1.

(i) Kidnapping.

(j) Sexual abuse.

(k) Taking a child for the purpose of prostitution as defined in § 13-3206.

(*l*) Child prostitution as defined in § 13-3212.

(m) Involving or using minors in drug offenses.

A dangerous crime against children is in the first degree if it is a completed offense and is in the second degree if it is a preparatory offense.

2. "Predicate felony" means any felony involving child abuse, a sexual offense, conduct involving the intentional or knowing infliction of serious physical injury or the use or exhibition of a deadly weapon or dangerous instrument, or a dangerous crime against children in the first or second degree.

Added by Laws 1985, Ch. 364, § 6, eff. May 16, 1985. Amended by Laws 1987, Ch. 166, § 1; Laws 1987, Ch. 307, § 4.

[1] Section 13-1001 et seq.

**Historical Note**

Laws 1987, Ch. 166, § 1, provided in subsec. A for taking a child for the purpose of prostitution and child prostitution, and add pars. (1)k and 1(*l*) to subsec. K.

Laws 1987, Ch. 307, § 4, provided for involving a minor in a drug offense in subsec. A, and added subsec. K1(m).

Former § 13-604.01, added by Laws 1982, Ch. 322, § 2, amended by Laws 1983, Ch. 32, § 1, Laws 1984, Ch. 163, § 1, and Laws 1985, Ch. 227, § 1, and relating to punishment for offenses committed while released from confinement, was renumbered as § 13-604.02 by Laws 1985, Ch. 364, § 5, effective May 16, 1985.

**1987 Reviser's Note:**

This section contains the amendments made by Laws 1987, Ch. 166, § 1 and Ch. 307, § 4, which were blended together as shown above pursuant to authority of § 41-1304.03.

## § 13–701. Sentence of imprisonment for felony; presentence report

**A.** A sentence of imprisonment for a felony shall be a definite term of years and the person sentenced, unless otherwise provided by law, shall be committed to the custody of the state department of corrections.

**B.** No prisoner may be transferred to the custody of the state department of corrections without a certified copy of the judgment and sentence, signed by the sentencing judge, and a copy of a recent presentence investigation report unless the court has waived preparation of the report.

**C.** Except as provided in § 13–604 the term of imprisonment for a felony shall be determined as follows for a first offense:

1. For a class 2 felony, seven years.
2. For a class 3 felony, five years.
3. For a class 4 felony, four years.
4. For a class 5 felony, two years.
5. For a class 6 felony, one and one-half years.

Added as § 13–901 by Laws 1977, Ch. 142, § 57, eff. Oct. 1, 1978. Renumbered as § 13–701 and amended by Laws 1978, Ch. 201, §§ 104, 105, eff. Oct. 1, 1978. Amended by Laws 1988, Ch. 66, § 1.

### Historical Note

**Source:**

Rev.Code 1928, § 4585.
Code 1939, § 43–2903.
A.R.S. former § 13–453.

The 1978 amendment substituted "shall be a definite term of years and the person sentenced unless otherwise provided by law, shall be committed to the custody of the department of corrections" for "except as provided in § 13–704, shall be a presumptive sentence" in subsec. A, and inserted "except as provided in § 13–604" in subsec. B.

The 1988 amendment inserted "state" preceding "department" in subsec. A; inserted subsec. B; and redesignated former subsec. B as subsec. C.

Section 13–701 as added by Laws 1977, Ch. 142, § 48, eff. Oct. 1, 1978, was transferred and renumbered as § 13–601; see italicized note preceding this section.

Original § 13–701, derived from Pen.Code 1901, §§ 30, 31, 33; Pen.Code 1913, §§ 30, 31, 33; Rev.Code 1928, § 4492; Code 1939, § 43–5701, and defining treason and provided punishment therefor, was repealed by Laws 1977, Ch. 142, § 23, eff. Oct. 1, 1978.

For disposition of the subject matter of sections of the former Criminal Code, see Disposition Tableat the front of this volume

**1978 Reviser's Note:**

Pursuant to authority of § 41–1304.02, a comma was added after the word "sentenced" in subsection A, and the words "Except as provided in § 13–604" were transposed to the beginning of the sentence in subsection B.

## § 13–604. Dangerous and repetitive offenders; definition

**A.** Except as provided in subsection F of this section or § 13–604.01, a person who is at least eighteen years of age or who has been tried as an adult and who stands convicted of a class 4, 5 or 6 felony, whether a completed or preparatory offense, and who has previously been convicted of any felony within ten years next preceding the date of the present offense shall be sentenced to imprisonment for not less than the sentence and not more than twice the sentence authorized by § 13–701 for the offense for which the person currently stands convicted and shall not be eligible for suspension or commutation of sentence, probation, pardon or parole, work furlough or release from confinement on any other basis except as specifically authorized by § 31–233, subsection A or B until not less than one-half of the sentence imposed by the court has been served. Upon imposing a sentence pursuant to this subsection the court shall impose as a presumptive term the median of the allowable range. The presumptive term may be mitigated or aggravated within the range prescribed under this subsection pursuant to the terms of § 13–702, subsections C, D and E.

**B.** Except as provided in subsection G of this section or § 13–604.01, a person who is at least eighteen years of age or who has been tried as an adult and who stands convicted of a class 2 or 3 felony, whether a completed or preparatory offense, and who has previously been convicted of any felony shall be sentenced to imprisonment for not less than the sentence and not more than three times the sentence authorized by § 13–701 for the offense for which the person currently stands convicted and shall not be eligible for suspension or commutation of sentence, probation, pardon or parole, work furlough or release from confinement on any other basis except as specifically authorized by § 31–233, subsection A or B until not less than two-thirds of the sentence imposed by the court has been served. Upon imposing a

sentence pursuant to this subsection the court shall impose as a presumptive term three-fourths of the median of the allowable range. The presumptive term may be mitigated or aggravated within the range prescribed under this subsection pursuant to the terms of § 13–702, subsections C, D and E.

**C.** Except as provided in subsection F or N of this section or § 13–604.01, a person who is at least eighteen years of age or who has been tried as an adult and who stands convicted of a class 4, 5 or 6 felony, whether a completed or preparatory offense, and who has been previously convicted of two or more felonies shall be sentenced to imprisonment for at least twice the sentence and not more than three times the sentence authorized by § 13–701 for the offense for which the person currently stands convicted and shall not be eligible for suspension or commutation of sentence, probation, pardon or parole, work furlough or release from confinement on any other basis except as specifically authorized by § 31–233, subsection A or B until not less than two-thirds of the sentence imposed by the court has been served. Upon imposing a sentence pursuant to this subsection the court shall impose as a presumptive term the median of the allowable range. The presumptive term may be mitigated or aggravated within the range prescribed under this subsection pursuant to the terms of § 13–702, subsections C, D and E.

**D.** Except as provided in subsection G or N of this section or § 13–604.01, a person who is at least eighteen years of age or who has been tried as an adult and who stands convicted of a class 2 or 3 felony, and who has been previously convicted of two or more felonies, shall be sentenced to imprisonment for at least twice the sentence and not more than four times the sentence authorized by § 13–701 for the offense for which the person currently stands convicted and shall not be eligible for suspension or commutation of sentence, probation, pardon or parole, work furlough or release from confinement on any other basis except as specifically authorized by § 31–233, subsection A or B until not less than two-thirds of the sentence imposed by the court has been served. Upon imposing a sentence pursuant to this subsection the court shall impose as a presumptive term three-fourths of the median of the allowable range. The presumptive term may be mitigated or aggravated within the range prescribed under this subsection pursuant to the terms of § 13–702, subsections C, D and E.

**E.** A person who is at least eighteen years of age or who has been tried as an adult and who stands convicted of any misdemeanor or petty offense, other than a traffic offense, and has been convicted of one or more of the same misdemeanors or petty offenses within two years next preceding the date of the present offense shall be sentenced for the next higher class of offense than that for which such person currently stands convicted.

**F.** Except as provided in § 13–604.01, a person who is at least eighteen years of age or who has been tried as an adult and who stands convicted of a class 4, 5 or 6 felony involving the intentional or knowing infliction of serious physical injury or the use or exhibition of a deadly weapon or dangerous instrument without having previously been convicted of any felony shall be sentenced to imprisonment for not less than the sentence and not more than

twice the sentence authorized in § 13–701 for the offense for which the person currently stands convicted and shall not be eligible for suspension or commutation of sentence, probation, pardon, parole, work furlough or release from confinement on any other basis except as specifically authorized by § 31–233, subsection A or B until not less than one-half of the sentence imposed by the court has been served. Except as provided in § 13–604.01, upon conviction of a class 4, 5 or 6 felony involving the intentional or knowing infliction of serious physical injury or the use or exhibition of a deadly weapon or dangerous instrument a person who has once previously been convicted of any felony involving the intentional or knowing infliction of serious physical injury or the use or exhibition of a deadly weapon or dangerous instrument shall be sentenced to imprisonment for twice the sentence and not more than three times the sentence authorized in § 13–701 for the offense for which the person currently stands convicted and shall not be eligible for suspension or commutation of sentence, probation, pardon, parole, work furlough or release from confinement on any other basis except as specifically authorized by § 31–233, subsection A or B until not less than two-thirds of the sentence imposed by the court has been served. Except as provided in subsection N of this section or § 13–604.01, upon conviction of a class 4, 5 or 6 felony involving the intentional or knowing infliction of serious physical injury or the use or exhibition of a deadly weapon or dangerous instrument a person who has been previously convicted of two or more felonies involving the intentional or knowing infliction of serious physical injury or the use or exhibition of a deadly weapon or dangerous instrument shall be sentenced to imprisonment for three times the sentence and not more than four times the sentence authorized in § 13–701 for the offense for which the person currently stands convicted and shall not be eligible for suspension or commutation of sentence, probation, pardon, parole, work furlough or release from confinement on any other basis except as specifically authorized by § 31–233, subsection A or B until not less than two-thirds of the sentence imposed by the court has been served. Upon imposing a sentence pursuant to this subsection the court shall impose as a presumptive term the median of the allowable range. The presumptive term may be mitigated or aggravated within the range prescribed under this subsection pursuant to the terms of § 13–702, subsections C, D and E.

G. Except as provided in § 13–604.01, upon a first conviction of a class 2 or 3 felony involving use or exhibition of a deadly weapon or dangerous instrument or upon conviction of a class 2 or 3 felony when the intentional or knowing infliction of serious physical injury upon another has occurred, the defendant shall be sentenced to imprisonment for not less than the sentence and not more than three times the sentence authorized in § 13–701 for the offense for which the person currently stands convicted and shall not be eligible for suspension or commutation of sentence, probation, pardon or parole, work furlough or release from confinement on any other basis except as specifically authorized by § 31–233, subsection A or B until not less than two-thirds of the sentence imposed by the court has been served. Except as provided in § 13–604.01, upon conviction of a class 2 or 3 felony involving the

use or exhibition of a deadly weapon or dangerous instrument or the intentional or knowing infliction of serious physical injury upon another, a person who has once previously been convicted of a class 1, 2 or 3 felony involving the use or exhibition of a deadly weapon or dangerous instrument or the intentional or knowing infliction of serious physical injury on another shall be sentenced to imprisonment for twice the sentence and not more than four times the sentence authorized in § 13–701 for the offense for which the person currently stands convicted and shall not be eligible for suspension or commutation of sentence, probation, pardon or parole, work furlough or release from confinement on any other basis except as specifically authorized by § 31–233, subsection A or B until not less than two-thirds of the sentence imposed by the court has been served. Except as provided in subsection N of this section or § 13–604.01, upon conviction for a class 2 or 3 felony involving the use or exhibition of a deadly weapon or dangerous instrument or the intentional or knowing infliction of serious physical injury upon another, a person who has been previously convicted of two or more class 1, 2 or 3 felonies involving the use or exhibition of a deadly weapon or dangerous instrument or the intentional or knowing infliction of serious physical injury on another shall be sentenced to imprisonment for three times the sentence and not more than five times the sentence authorized in § 13–701 for the offense for which the person currently stands convicted, and shall not be eligible for suspension or commutation of sentence, probation, pardon or parole, work furlough or release from confinement on any other basis except as specifically authorized by § 31–233, subsection A or B until not less than two-thirds of the sentence imposed by the court has been served. Upon imposing a sentence pursuant to this subsection the court shall impose as a presumptive term three-fourths of the median of the allowable range, except in the case of a person with two or more class 1, 2 or 3 felony convictions in which case the presumptive term shall be the median of the allowable range. The presumptive term may be mitigated or aggravated within the range prescribed under this subsection pursuant to the terms of § 13–702, subsections C, D and E. For the purposes of this subsection in determining the applicability of the penalties provided herein for second or subsequent class 2 or 3 felonies, the conviction for any felony committed prior to October 1, 1978 which, if committed after October 1, 1978, could be a dangerous felony under this section may be designated by the state as a prior felony.

**H.** Convictions for two or more offenses not committed on the same occasion but consolidated for trial purposes may, at the discretion of the state, be counted as prior convictions for purposes of this section. Convictions for two or more offenses committed on the same occasion shall be counted as only one conviction for purposes of this section.

**I.** A person who has been convicted in any court outside the jurisdiction of this state of an offense which if committed within this state would be punishable as a felony or misdemeanor is subject to the provisions of this section. A person who has been convicted as an adult of an offense punishable as a felony or a misdemeanor under the provisions of any prior code in this state shall be subject to the provisions of this section.

J. Time spent incarcerated within the ten years next preceding the date of the offense for which a person is currently being sentenced under subsection A of this section and time spent incarcerated within the two years next preceding the date of the offense for which a person is currently being sentenced under subsection E of this section shall not be included in the ten years or two years required to be free of convictions for purposes of those subsections.

K. The penalties prescribed by this section shall be substituted for the penalties otherwise authorized by law if the previous conviction, the dangerous nature of the felony or the allegation that the defendant committed a felony while released on bond or on his own recognizance as provided in subsection M of this section is charged in the indictment or information and admitted or found by the trier of fact. The court shall allow the allegation of a prior conviction, the dangerous nature of the felony or the allegation that the defendant committed a felony while released on bond or on his own recognizance at any time prior to the date the case is actually tried unless the allegation is filed fewer than twenty days before the case is actually tried and the court finds on the record that the defendant was in fact prejudiced by the untimely filing and states the reasons for these findings, provided that when the allegation of a prior conviction is filed, the state must make available to the defendant a copy of any material or information obtained concerning the prior conviction. Before the trial on the charge of the previous conviction or the allegation that the defendant committed a felony while released on bond or on his own recognizance, the charge of previous conviction or the allegation that the defendant committed a felony while released on bond or on his own recognizance shall not be read to the jury. For the purposes of this subsection, "dangerous nature of the felony" means a felony involving the use or exhibition of a deadly weapon or dangerous instrument or the intentional or knowing infliction of serious physical injury upon another.

L. Intentional failure by the court to impose the mandatory sentences or probation conditions provided in this title shall be deemed to be malfeasance.

M. A person convicted of committing any felony offense, which felony offense is committed while the person is released on bail or on his own recognizance on a separate felony offense, shall be sentenced to a term of imprisonment two years longer than would otherwise be imposed for the felony offense committed while released on bond or on his own recognizance. The additional sentence imposed under this subsection is in addition to any enhanced punishment that may be applicable under any of the other subsections of this section.

N. A person who is at least eighteen years of age or who has been tried as an adult and who stands convicted of a serious offense except first degree murder or any dangerous crime against children, whether a completed or preparatory offense, and who has previously been convicted of two or more serious offenses not committed on the same occasion shall be sentenced to life imprisonment and is not eligible for suspension or commutation of sentence, probation, pardon, parole, work furlough or release from confine-

ment on any other basis except as specifically authorized by § 31–233, subsection A or B until the person has served not less than twenty-five years.

*O.* As used in this section, "serious offense" means any of the following offenses if committed in this state or any offense committed outside this state which if committed in this state would constitute one of the following offenses:

1. First degree murder.
2. Second degree murder.
3. Manslaughter.
4. Aggravated assault resulting in serious physical injury or committed by the use of a deadly weapon or dangerous instrument.
5. Sexual assault.
6. Any dangerous crime against children.
7. Arson of an occupied structure.
8. Armed robbery.
9. Burglary in the first degree.
10. Kidnapping.
11. Sexual conduct with a minor under fifteen years of age.
12. A drug related felony offense pursuant to § 13–3404.01, a violation of § 13–3405 involving an amount of marijuana having a weight at the time of seizure of eight pounds or more, a felony violation of § 13–3406 or any violation of §§ 13–3407 through 13–3409.

Added as § 13–704 by Laws 1977, Ch. 142, § 48, eff. Oct. 1, 1978. Renumbered as § 13–604 and amended by Laws 1978, Ch. 201, §§ 98, 101, eff. Oct. 1, 1978. Amended by Laws 1980, Ch. 229, § 7, eff. April 23, 1980; Laws 1981, Ch. 165, § 1; Laws 1982, Ch. 322, § 1; Laws 1984, Ch. 42, § 1; Laws 1984, Ch. 325, § 1; Laws 1985, Ch. 146, § 1; Laws 1985, Ch. 364, § 4, eff. May 16, 1985; Laws 1987, Ch. 307, § 3.

**Historical Note**

**Source:**
Pen.Code 1901, §§ 618, 630, 632.
Pen.Code 1913, §§ 726, 738, 739.
Rev.Code 1928, §§ 4898, 4899.
Code 1939, § 43–6112.
Laws 1951, Ch. 110, § 1.
Code 1939, Supp.1952, § 43–6111.
A.R.S. former §§ 13–1649, 13–1650.

The 1978 amendment, in subsec. A, inserted "of this section", substituted "§ 13–701" for "§ 13–901", and substituted "not less than one-half of the sentence imposed by the court" for "the minimum sentence" in the first sentence, in the second sentence substituted "subsection" for "paragraph", deleted "three-fourths of" following "presumptive term" and deleted an exception clause relating to class 6 felonies, and in the final sentence inserted "prescribed under this subsection" and substituted "13–702, subsection C, D and E" for "13–901.01"; in subsec. B, inserted "of this section", substituted "13–701" for "13–901", "subsection" for "paragraph", and "13–702, subsections C, D and E" for "13–702", and inserted "not less than two-thirds of"; in subsec. C, inserted "of this section", substituted "13–701" for "13–901", and inserted "not less than two-thirds of" in the first sentence, substituted "subsection" for "paragraph" and deleted "three-fourths of", and an exception clause to class 6 felonies in the second sentence, and in the final sentence inserted "prescribed under this subsection" and substituted "13–702, subsections C, D and E" for "13–901.01"; in subsec. D, inserted "of this section", substituted "13–701" for "13–901", and inserted "not less than two-thirds of" in the first sentence, in the second sentence substitut-

ed "subsection" for "paragraph", and in the final sentence inserted "prescribed under this subsection" and substituted "13–702, subsections C, D and E" for "13–901.01"; in subsec. E, inserted references to petty offenses and reduced convictions from two to one; inserted subsec. F, and redesignated subsequent subsections; in subsec. G, substituted "or knowing" for "knowing or reckless", "13–701" for "13–901" and inserted "not less than two-thirds of" throughout the first sentence, in the second sentence substituted "subsection" for "paragraph" and added exception, in the third sentence inserted "prescribed under this subsection" and substituted "13–702, subsections C, D and E" for "13–901.01", and added the final sentence; in subsec. H, deleted "or as part of a single continuing course of action" following "some occasion", inserted "at the discretion of the state", and added the second sentence; and in subsec. K, inserted "or the dangerous nature of the felony" in the first and second sentences, inserted "of a prior conviction" in the second sentence and added the final sentence.

The 1980 amendment substituted near the end of subsec. G "if committed after October 1, 1978, could be a dangerous felony under this section" for "carries a penalty of up to life imprisonment". Prior to amendment, subsec. G provided:

"Upon a first conviction of a class 2 or 3 felony involving use or exhibition of a deadly weapon or dangerous instrument or upon conviction of a class 2 or 3 felony when the intentional or knowing infliction of serious physical injury upon another has occurred, the defendant shall be sentenced to imprisonment for not less than the sentence and not more than three times the sentence authorized in § 13–701 for the offense for which the person currently stands convicted, and shall not be eligible for suspension or commutation of sentence, probation, pardon or parole or release on any other basis until not less than two-thirds of the sentence imposed by the court has been served. Upon a second conviction of a class 2 or 3 felony involving use or exhibition of a deadly weapon or dangerous instrument or upon a second conviction for a class 2 or 3 felony when the intentional or knowing infliction of serious physical injury upon another has occurred, the defendant shall be sentenced to imprisonment for twice the sentence and not more than four times the sentence authorized in § 13–701 for the offense for which the person currently stands convicted, and shall not be eligible for suspension or commutation of sentence, probation, pardon or parole or release on any other basis until not less than two-thirds of the sentence imposed by the court has been served. Upon a third or subsequent conviction for a class 2 or 3 felony involving use or exhibition of a deadly weapon or dangerous instrument or upon the third or subsequent conviction for a class 2 or 3 felony when the intentional or knowing infliction of serious physical injury upon another has occurred, the defendant shall be sentenced to imprisonment for three times the sentence and not more than five times the sentence authorized in § 13–701 for the offense for which the person currently stands convicted and shall not be eligible for suspension or commutation of sentence, probation, pardon or parole or release on any other basis until not less than two-thirds of the sentence imposed by the court has been served. Upon imposing a sentence pursuant to this subsection the court shall impose as a presumptive term three-fourths of the median of the allowable range, except in the case of a third or subsequent conviction in which case the presumptive term shall be the median of the allowable range. The presumptive term may be mitigated or aggravated within the range prescribed under this subsection pursuant to the terms of § 13–702, subsections C, D and E. For the purposes of this subsection in determining the applicability of the penalties provided herein for second or subsequent class 2 or 3 felonies, the conviction for any felony committed prior to October 1, 1978 which carries a penalty of up to life imprisonment may be designated by the state as a prior felony."

The 1981 amendment included provisions in subsec. K pertaining to allegations that defendant committed a felony while released on bond or his own recognizance, and added subsec. M.

The 1982 amendment substituted throughout the section "work furlough or release from confinement on any basis except as specifically authorized by § 31–233, subsection A or B" for "or release on any other basis".

Laws 1982, Ch. 322, § 10 provides:

"Notwithstanding the provisions of this act, the legislature intends that, if the provisions of title 41, chapter 20 [§ 41–2351 et seq.], Arizona Revised Statutes, operate to terminate the state department of corrections or the board of pardons and paroles, any provisions regarding powers, duties, functions or personnel added or amended by this act terminate on the date of termination of the agency affected."

Laws 1984, Ch. 42, § 1, substantially rewrote provisions for multiple subsequent offenses involving deadly or dangerous weapons in subsec. G.

Laws 1984, Ch. 325, § 1, inserted exception pertaining to subsec. N in subsecs. F and G, and added subsec. N.

Laws 1985, Ch. 146, § 1, in subsec. K modified the second sentence by substituting "shall" for "in its discretion may", and inserting "the date the case is actually tried unless the allegation is filed fewer than twenty days before the case is actually tried and the court finds on the record that the defendant was in fact prejudiced by the untimely filing and states the reasons for these findings".

Laws 1985, Ch. 364, § 4, inserted in subsecs. F and G references to § 13–604.01; inserted in subsec. N "or any dangerous crime against children" and substituted same for "Child molestation" as subsec. *O*, 6; and added subsec. *O*, 11.

The 1987 amendment added subsec. *O*, 12.

Former § 13–604 was transferred and renumbered as § 13–1004; see italicized note preceding § 13–601.

**Reviser's Notes:**

**1984 Note.** Prior to the 1985 amendments, this section contained the amendments made by Laws 1984, Ch. 42, § 1 and Ch. 325, § 1 which were blended together pursuant to authority of § 41–1304.03.

**1985 Note.** This section contains the amendments made by Laws 1985, Ch. 146, § 1 and Ch. 364, § 4 which were blended together as shown above pursuant to authority of § 41–1304.03.

SUPREME COURT OF ARIZONA

FILED
JUL 14 1992
NOEL K. DESSAINT
CLERK SUPREME COURT
BY

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| STATE OF ARIZONA,<br>Appellee,<br>vs.<br>JOSEPH BARTLETT, JR.,<br>Appellant. | Supreme Court<br>No. CR-88-0411-PR<br>Court of Appeals<br>No. 2 CA-CR 88-0024<br>Cochise County<br>No. CR-87-00020<br>**O R D E R** |

Appellee's "Motion to Recall and Stay Mandate" having been filed, and the Court having considered said motion,

IT IS ORDERED denying Appellee State of Arizona's motion to recall and stay mandate.

DATED this 14th day of July, 1992.

STANLEY G. FELDMAN
Chief Justice

TO:
Hon. Grant Woods, Attorney General
Attn: Paul J. McMurdie, Esq. and Linda L. Knowles, Esq.
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APPENDIX E